RESCUING RETROGRESSION

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I. INTRODUCTION

The Voting Rights Act[1] ain't what it used to be. After a nearly half-century run of success, the Supreme Court used *Shelby County v. Holder*[2] to put one of the most seminal provisions of the Act, section 5, into what amounts to a permanent exile. While technically *Shelby County* did not slay section 5—it only interred the coverage formula from section 4 of the Act that makes section 5 operative—it seems unlikely section 5 will ever be functional again.[3]

Section 5's demise is a shame. Section 5 prevented certain state or local governments (the so-called "covered jurisdictions") from implementing changes to voting laws, such as redistricting plans or the movement of polling places, that discriminated against racial and language minorities (i.e., "minority voters").[4] Section 5 accomplished this important task through a process known as "preclearance" where the covered jurisdictions would have to garner approval from the federal government—either the United States Attorney General or a federal court in Washington, D.C.—prior to implementing any voting change.[5] Over the years, this preclearance process prevented the implementation of voting changes adopted with a discriminatory purpose or, most importantly for purposes of this Article, which would have a retrogressive effect on minority voters.[6] As a result, minority

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* © 2016. Professor of Law and Dean's Fellow, Indiana University Robert H. McKinney School of Law. Thanks to Susan DeMaine for library assistance, Jessica Dickinson for research assistance, and Bob Berman for helpful comments. Thanks also to Franita Tolson and the editors of the *Florida State University Law Review* for organizing an excellent conference on the law of democracy and to the participants in the conference, especially Michael Morley, for comments.

1. 52 U.S.C. §§ 10301-10702 (Supp. II 2014).

2. 133 S. Ct. 2612 (2013).

3. *Id.* at 2631 (declaring section 4(b) unconstitutional and "issu[ing] no holding on § 5 itself").

4. FOLEY, PITTS & DOUGLAS, ELECTION LAW AND LITIGATION: THE JUDICIAL REGULATION OF POLITICS 97-98 (2014).

5. *Id.* at 99-100.

6. *Id.* at 100-01.

voters were able to make and retain significant gains in both the ability to cast a countable ballot and the ability to elect preferred candidates of their choice.[7]

The demise of section 5 means section 2 of the Voting Rights Act[8] now stands as the main bulwark against voting discrimination. Section 2—for reasons that will be described more fully in this Article—does not provide the same level of protection as section 5. Section 2, through affirmative litigation brought by minority plaintiffs, prevents the use of electoral laws that under the "totality of the circumstances" have discriminatory "results."[9] This "results" standard provides less protection for minority voters than section 5's retrogression test.

The thesis of this Article is a simple one—that the section 5 retrogression test should be "rescued" by importing it into the section 2 results framework. More specifically, proof that a newly adopted voting law will retrogress minority voting strength should create a strong presumption that the newly adopted voting law violates the section 2 results test. Part II of this Article will explicate more fully what the demise of section 5 has wrought and why the retrogression test is one of the most important things that has disappeared. Part III of this Article will provide details on how the retrogression test could be imported into section 2 and defends that importation from a doctrinal and theoretical perspective.

II. SECTION 5: WHAT HAS BEEN LOST

To fully comprehend why the section 5 retrogression standard should be imported into the section 2 results test, one needs to understand several things. First, one needs to appreciate how section 5's retrogression standard operated as a protection for minority voters. Second, one needs to know what section 2's results test currently protects. Finally, one needs to grasp the nature of the loss of

7. *See* Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1582-88 (2010) (describing how enforcement of section 5 both retained existing gains for minority voters and compelled the creation of additional opportunities to elect candidates of choice); *see also* Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 923 (2008) [hereinafter Pitts, *Maintenance*] ("Section 5, however, served as more than a shield to prevent backsliding; it was also wielded by the federal government as a sword to affirmatively compel the creation of additional 'safe' single-member districts, which inexorably led to an increase in descriptive representation.").

8. 52 U.S.C. § 10301 (Supp. II 2014).

9. *Id.* While the Supreme Court has not definitively so held, it would appear that section 2 also prevents the use of electoral laws that are purposefully discriminatory. Nipper v. Smith, 39 F.3d 1494, 1520 (11th Cir. 1994) (en banc) (holding that a section 2 violation can be proved by showing discriminatory purpose).

protection for minority voters that resulted from *Shelby County*—or what the University of Chicago's Nicholas Stephanopoulos refers to as "the gap between Section 2 and Section 5."[10]

Section 5 had two unique aspects—one procedural, the other substantive. The unique procedural aspect was the idea of preclearance. In essence, covered jurisdictions were permanently enjoined from making changes to their election laws.[11] In other words, section 5 froze the electoral laws in the covered jurisdictions, and a voting change could only be implemented in a covered jurisdiction if approval (i.e., preclearance) was obtained from a federal entity in Washington, D.C.—either the United States Attorney General through an administrative process or the D.C. District Court through litigation.[12] In each instance, the federal government could not approve the voting change until determining the covered jurisdiction had met its burden of proving the change did not discriminate against minority voters in purpose or effect.[13]

On the other hand, section 2, the primary remaining protection for minority voters, relies on the normal litigation process. Instead of voting laws being frozen until federal approval, a jurisdiction can immediately adopt and implement a voting change.[14] The change will remain in place until a plaintiff brings an affirmative lawsuit and either proves that preliminary injunctive relief should issue or wins the case on the merits, both of which involve some demonstration that the voting change produces discriminatory results against minority voters.[15]

In my view, losing the actual process of section 5 preclearance is the biggest harm to minority voters emanating from the *Shelby County* decision for two reasons. First, a huge deterrent to the adoption of discriminatory voting changes has been eliminated. The covered jurisdictions knew that to implement any voting change they had to secure federal approval and that federal approval would focus solely on the presence or absence of discrimination against minority voters. This knowledge led to the covered jurisdictions not adopting potentially discriminatory changes at all.[16] Second, the section 5 pro-

10. Nicholas O. Stephanopoulos, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 57 (2013).

11. Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?* 81 DENVER U. L. REV. 225, 232-34 (2003).

12. *Id.*

13. *Id.* at 235.

14. *See* 52 U.S.C. § 10301 (Supp. II 2014).

15. Preliminary injunctive relief would involve demonstrating a likelihood of success on the merits. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 23 (2008) (providing standard for preliminary injunctive relief).

16. Pitts, *supra* note 11, at 259 (describing deterrence factor); Tomas Lopez, Shelby County: *One Year Later*, BRENNAN CTR. FOR JUST. 2 (2014), http://www.brennancenter.org/

cess ensured that every single electoral change in the covered jurisdictions received some kind of review—what we might describe in *Harry Potter* terms as "constant vigilance."[17] There was no opportunity for a voting change to slip through the cracks and be implemented in a covered jurisdiction without having some level of review by the federal government to ensure the absence of discrimination.[18]

One does not have to look very far following the *Shelby County* decision to see how section 5 deterred the adoption of discriminatory changes.[19] In April 2013, prior to the *Shelby County* ruling, the North Carolina House passed a photo identification bill.[20] That bill sat idle, though, in the North Carolina Senate Rules Committee, quite likely because North Carolina Senators thought the bill would not pass muster under section 5.[21] But then *Shelby County* was handed down in June and the Senate Rules Committee Chair said, "So, now we can go with the full bill."[22] The "full bill" ultimately adopted by North

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sites/default/files/analysis/Shelby_County_One_Year_Later.pdf (noting "hundreds of voting changes that were deterred because jurisdictions knew they would not withstand [Section 5] VRA review"); *see also* Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1055 (D. Ariz. 2014) ("[Several factors] may work together to tilt the board somewhat because they encourage a state that wants to obtain preclearance to overshoot the mark, particularly if it wants its first submission [to the Justice Department] to be approved. Because it is not clear where the Justice Department will draw the line, there is a natural incentive to provide a margin of error or to aim higher than might actually be necessary.").

17. J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 217 (2000).

18. Admittedly, this is from a theoretical perspective. It was always possible for a jurisdiction not to comply with section 5 preclearance by failing to submit a voting change for federal approval. However, such a failure was easily cured because a plaintiff could bring what was known as a section 5 enforcement action. *See* Pitts, *supra* note 11, at 236 (describing section 5 enforcement actions). Such an enforcement action was easy to win on the merits because all that needed proving was that a voting change had occurred and that preclearance for the change had not been obtained. *See id.*

19. *See* Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html; *see also* Theresa Anne Bodwin, *Rocking the Vote: How Preclearance Became Powerless and the Way to Bring the Power Back*, 1 INDON. J. INT'L & COMP. L. 502, 528-32 (2014) (describing adoption of potentially discriminatory changes after *Shelby County*); Lopez, *supra* note 16, at 2-4 (also describing states' adoption of potentially discriminatory changes after *Shelby County*).

20. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 230 (4th Cir. 2014).

21. *Id.* at 231 (noting that the Senate Rules Committee took no action on the proposal and implying that the lack of action related to the need to submit the proposal for preclearance); *see also id.* at 229 ("On June 25, 2013, the Supreme Court lifted certain Voting Rights Act restrictions that had long prevented jurisdictions like North Carolina from passing laws that would deny minorities equal access. The very next day, North Carolina began pursuing sweeping voting reform . . . .") (citation omitted). Indeed, one federal court had already used section 5 to bar Texas' photo identification requirement and another federal court had, in essence, rewritten South Carolina's photo identification requirement to prevent retrogression. *See generally* Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012); South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012).

22. *League of Women Voters*, 769 F.3d at 231.

Carolina included several changes that likely would have violated section 5 and are currently being challenged using section 2.[23] But the "full bill" probably would never have been adopted absent *Shelby County*.[24]

There is also good reason to think discriminatory changes will go unchallenged prior to implementation, particularly at the local level. High-profile changes, such as those that occurred in North Carolina, will likely generate publicity and concomitant litigation. However, lower-profile changes, such as redistricting plans in small school districts or changes from, say, single-member districts to at-large elections in little towns, could easily not generate attention.[25] Moreover, even if they do generate some attention, there may not be sufficient incentives to litigate against such changes either prior to implementation or at all.[26]

Unfortunately, the section 5 process, to paraphrase pop-star Taylor Swift, seems likely to "never, ever, ever, ever get back together."[27] Proposals to revive some form of section 5 lie stalled in Congress.[28] And even if such proposals miraculously navigate the legislative shoals, the Supreme Court's *Shelby County* decision leaves open the possibility of directly striking down section 5 in subsequent litigation.[29]

The preclearance process, though, was not the only unique aspect of section 5—section 5 also contained a special substantive standard for preventing discrimination. Section 5's substantive standard was

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23. *Id.* at 229 ("North Carolina imposed strict voter identification requirements, cut a week off of early voting, prohibited local election boards from keeping the polls open on the final Saturday afternoon before elections, eliminated same-day voter registration, opened up precincts to 'challengers,' eliminated pre-registration of sixteen- and seventeen-year-olds in high schools, and barred votes cast in the wrong precinct from being counted at all.").

24. Daniel P. Tokaji, *Responding to* Shelby County*: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 77 (2014) ("There is no doubt that *Shelby County*'s removal of the preclearance bar precipitated enactment of this legislation. And North Carolina could be a harbinger of what is to come."). For obvious reasons, it's hard at this point to provide an example of a change that has slipped through the cracks.

25. Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 612-17 (2005) (arguing that section 5's greatest deterrent impact occurs at the local level).

26. *See id.*

27. TAYLOR SWIFT, WE ARE NEVER EVER GETTING BACK TOGETHER (Big Machine 2012).

28. *See* Greg Sargent, *Morning Plum: Why Congress Won't Fix the Voting Rights Act Anytime Soon*, WASH. POST (Mar. 9, 2015), http://www.washingtonpost.com/blogs/plum-line/wp/2015/03/09/morning-plum-why-congress-wont-fix-the-voting-rights-act-anytime-soon/.

29. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) ("We issue no holding on § 5 itself . . . ."); *see also id.* ("I would find § 5 of the Voting Rights Act unconstitutional as well.") (Thomas, J., concurring).

two-pronged. On the one hand, section 5 prohibited voting changes adopted with a discriminatory purpose.[30] The purpose standard, however, exists both in the Equal Protection Clause and in section 2 of the Voting Rights Act, so it was not unique to section 5.[31] On the other hand, section 5 prohibited voting changes adopted with a discriminatory effect, with discriminatory effect defined as any change that would lead to a retrogression of minority voting strength.[32] Thus, section 5 uniquely prevented the implementation of new voting laws that would leave minority voters worse off than if the status quo was retained.[33]

A couple of simple examples—one from the context of vote dilution (i.e., the ability to elect a sufficient number of preferred candidates of choice) and the other from the context of vote denial (i.e., the inability to participate in an election by casting a countable ballot)—demonstrate how this worked. The first hypothetical involves vote dilution and redistricting. Assume the City of Mobile, Alabama, had seven single-member districts and three of those districts were controlled by minority voters, thus allowing minority voters to elect their preferred candidates of choice.[34] Then assume that the City adopted a redistricting plan reducing the number of single-member districts controlled by minority voters from three districts to two districts and sought preclearance for that new redistricting plan. In this simplified hypothetical, section 5 prevented the implementation of the newly adopted redistricting plan because it reduced by one the number of districts controlled by minority voters.

The second hypothetical involves vote denial and the moving of a polling place. Assume the City of Augusta, Georgia, had a precinct with a polling place in a government building located in the middle of a minority neighborhood. Assume that the City decided to move the polling place several miles away from the minority neighborhood to a white neighborhood, and that the new polling place would be a

30. 52 U.S.C. § 10304(b)-(c) (Supp. II 2014).

31. *See* Rogers v. Lodge, 458 U.S. 613, 617-19 (1982) (describing discriminatory purpose under the Equal Protection Clause); *see also* Garza v. Cty. of Los Angeles, 918 F.2d 763, 766 (9th Cir. 1990) ("Thus, after the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes.").

32. 52 U.S.C. § 10304(b); Beer v. United States, 425 U.S. 130, 141 (1976) ("[T]he purpose of [§] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

33. Texas v. United States, 866 F. Supp. 20, 27 (D.D.C. 1994) (explaining that "preclearance [must] be denied under the 'effects' prong of section 5 if a new system places minority voters in a weaker position than the existing system").

34. Districts that allow minority voters to elect preferred candidates of choice are generally referred to as "safe," "crossover," or "coalition" districts. For definitions of these terms, see Bartlett v. Strickland, 556 U.S. 1, 13 (2009).

church with an all-white congregation. In this simplified hypothetical, section 5 prevented the polling place from moving out of the minority neighborhood because it would make it harder for minority voters to participate in an election.

The two losses of *Shelby County* recognized above on the procedural and substantive level are similar to the losses recognized by the University of Chicago's Nicholas Stephanopoulos. In an article devoted to, in essence, identifying what was lost when *Shelby County* neutered section 5, Professor Stephanopoulos identifies three key procedural differences between section 5 and the most prominent remaining bulwark against voting discrimination—section 2:

> The burden of proof is on the plaintiff under Section 2 but on the jurisdiction under Section 5. The default is that a challenged policy goes into effect under Section 2 but that it does not under Section 5. And the party that typically invokes the VRA's protections is a private plaintiff under Section 2 but the DOJ under Section 5.[35]

In essence, the second and third aspects identified by Professor Stephanopoulos are the section 5 preclearance process itself. In that way, we are in agreement that much was lost from a process perspective. However, in my view, and how I differ from Professor Stephanopoulos is on my focus of emphasis. Professor Stephanopoulos largely analyzes the gap from the perspective of a change duly adopted being put through the preclearance process as opposed to affirmative litigation under section 2.[36] In contrast, my main emphasis of what was lost procedurally would be on the deterrence value of section 5. Put differently, Professor Stephanopoulos's article seems to focus on the gap between section 2 and section 5 *after a change is actually adopted*;[37] I think the primary procedural loss occurs because section 5 prevented discriminatory changes from ever being adopted in the first place.[38]

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35. Stephanopoulos, *supra* note 10, at 57. I do not think the shifting of the burden of proof is all that significant of a difference between section 2 and section 5. The burden of proof should only come into play when the evidence is in equipoise, and that does not happen all that often. Indeed, Professor Stephanopoulos seems to imply that the burden of proof will not play a large role in many instances. *Id.* at 63 ("Sometimes the allocation of the burden is immaterial.").

36. *Id.* at 118-26.

37. *See id.* at 66 (focusing on empirical evidence of "how many policies that were blocked by Section 5 would have gone into effect had only Section 2 been available to challenge them" while only briefly recognizing the deterrent effect of section 5).

38. To put the idea differently, if a change that arguably violates section 2 is never adopted in the first place, one does not have to worry at all about different burdens of proof, a discriminatory law going into temporary effect, or the need for private plaintiffs to litigate.

On the substantive side, Professor Stephanopoulos distinguishes between the vote dilution and vote denial context. In the vote dilution context, he identifies the gap between section 2 and section 5 as:

> Section 2 does not extend to bizarrely shaped districts while Section 5 does. Section 2 does not encompass districts that merge highly dissimilar minority communities while Section 5 again does. And Section 2 does not cover districts whose minority voters comprise less than 50 percent of their total population while Section 5 does once more.[39]

On the vote denial side, Professor Stephanopoulos notes:

> Under Section 2, plaintiffs typically need to demonstrate not only that a statistical disparity exists between minorities and whites, but also that a franchise restriction interacts with social and historical conditions to cause the disparity. Under Section 5, on the other hand, a disparate impact alone usually suffices to prevent a restriction from going into effect, as long as the burden imposed by the restriction on voting is material.[40]

Again, Professor Stephanopoulos and I are in much agreement in relation to the substantive loss, but my emphasis would be different in the vote dilution context. I agree with Professor Stephanopoulos that section 2 would not prevent the backsliding of so-called "crossover" districts where minority voters comprise less than fifty percent of the district's total population and also might substantially agree that section 2 does not cover districts that merge highly dissimilar minority communities (what Professor Stephanopoulos terms "heterogeneous" districts).[41] Yet my concern about the gap between section 2 and section 5 does not lie solely with losing bizarrely shaped districts, crossover districts, or heterogeneous districts. My main concern is losing what one might call "run of the mill" districts that allow minority voters to elect preferred candidates of choice and that do not fall into any of these categories, and I will discuss this concern more in Part III.[42]

In short, procedural and substantive losses resulted from *Shelby County*. And it seems unlikely that the section 5 process will be re-

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39. Stephanopoulos, *supra* note 10, at 58.

40. *Id.* at 60.

41. *Id.* at 74. I disagree with Professor Stephanopoulos that section 5 required the retention of "bizarrely shaped" districts. *See id.* The Department of Justice's guidance on this matter explicitly stated that "preventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno* and related cases." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). And it appears from Professor Stephanopoulos's article that he equates "bizarrely shaped" districts with those that violate the *Shaw* line of cases. *See* Stephanopoulos, *supra* note 10, at 77-78 (noting the *Shaw* line of cases in discussing geographic compactness).

42. *See infra* notes 51-55.

suscitated. However, it seems slightly more possible that the substantive retrogression standard could be salvaged in some way, shape, or form. The next Part turns to an analysis of how that retrogression standard could be rescued and why it should be rescued.

III. RESCUING RETROGRESSION

The days of section 5's procedural prowess seem finished, but the unique substantive standard of retrogression might still be saved. In this Part, I will lay out a substantive proposal for rescuing the retrogression standard. I will also explain why this proposal can comport with existing doctrine and why this proposal makes sense from a theoretical perspective. Finally, I will address potential pitfalls and downsides of this proposal.

A. The Presumption of a Section 2 Violation

The basic framework for rescuing retrogression is a simple one—make the retrogression test from section 5 a part of the substantive standard of section 2. I would propose to do that by adding a gloss on the current framework for finding a violation of section 2—creating a strong presumption of a section 2 violation when a voting change retrogresses minority voting strength.

But before discussing the addition of retrogression into section 2, one must know how section 2's results standard operates. To prove a violation of the section 2 results standard in the context of vote dilution claims (e.g., claims against at-large election systems or redistricting plans), plaintiffs must show the existence of the three so-called *Gingles* preconditions: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that minority citizens are "politically cohesive" (i.e., they vote as a cohesive bloc); and (3) that white voters cast ballots "sufficiently as a bloc to enable [them] . . . usually to defeat the minority's preferred candidate."[43] If a plaintiff proves the existence of the *Gingles* preconditions, then the court considers the "totality of the circumstances,"[44] which includes an examination of the so-called Senate Factors, such as a history of voting-related discrimination, and whether proportionality exists.[45]

The key, though, to section 2's vote dilution framework is that it can compel a state or local government to create additional opportunities for minority voters to elect preferred candidates of choice. For

43. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).

44. *Id.* at 36-37.

45. *Id.* at 36-37, 44-45; Pitts, *Maintenance, supra* note 7, at 920 n.111 (listing the "Senate factors"); *see also* Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) (noting the relevance of proportionality to the totality of circumstances).

instance, a successful section 2 lawsuit can force a county to switch from an at-large system where minority voters were unable to elect any preferred candidate of choice to a system of single-member districts where minority voters are able to elect at least one preferred candidate of choice. A successful section 2 lawsuit can also compel a county that already has single-member districts to create one or more districts allowing minority voters to elect preferred candidates of choice.

The approach section 2 takes to election laws that might deny the ability to cast a countable ballot (such as the locations of polling places, the equipment used to vote, voter identification requirements) is, to put it mildly, not nearly as well defined.[46] Suffice to say that no clear framework has emerged to answer important questions such as whether proof of vote dilution is necessary to a section 2 claim and whether there is a "voter fault" defense under section 2.[47] Indeed, the greatest sticking point may be what more needs to be proved beyond disparate impact to find a violation of section 2 in the vote denial context. Several courts have asserted that a plaintiff bringing a section 2 vote denial claim needs to prove something more than disparate impact,[48] but as Professor Stephanopoulos notes, "the lower courts disagree as to what this 'something more' actually is."[49]

My proposal would preserve existing section 2 doctrine as it relates to vote dilution and vote denial when challenging *existing laws*. I would, however, add an additional layer to the section 2 results

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46. Simmons v. Galvin, 575 F.3d 24, 42 n.24 (1st Cir. 2009); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 595 (2013) ("[T]he legal contours of vote denial claims remain woefully undeveloped . . . ."); Stephanopoulos, *supra* note 10, at 107 ("[I]t remains quite unclear how . . . [section 2] applies to vote denial."); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 709 (2006) ("While *Gingles* and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge.").

47. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 408-09 (2012).

48. *See, e.g.*, Brown v. Detzner, 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012) ("[I]t appears that in the Eleventh Circuit a plaintiff must demonstrate something more than disproportionate impact to establish a Section 2 violation."); *see also* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) ("Section 2(b) tells us that § 2(a) does not condemn a voting practice just because it has a disparate effect on minorities."); Gonzalez v. Arizona, 677 F.3d 383, 405 (9th Cir. 2012) ("[A] § 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged voting qualification causes that disparity, will be rejected." (quoting Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997))).

49. Stephanopoulos, *supra* note 10, at 108-09 (discussing lower court case law in this area). I tend to agree with Professor Stephanopoulos that in the vote denial context "there *is* substantive space between Section 2 and Section 5—but that it is not as extensive as it first might seem." *Id.* at 116.

standard when dealing with a newly adopted law.[50] In such a situation, if plaintiffs could demonstrate that the newly adopted law would have a retrogressive effect on minority voters, the newly adopted law would presumptively violate the section 2 results test. The burden would then shift to the defendant state or local government to provide a legitimate, nondiscriminatory reason for the retrogression in order to avoid section 2 liability.

Consider a few hypothetical applications. Assume a city with a 33% citizen voting age Latino population has five single-member districts, two of which allow Latino voters to elect preferred candidates of choice. On the heels of the most recent Census data, the city adopted a redistricting plan that only includes one district that allows Latino voters to elect a preferred candidate of choice. In this situation, the retrogression in the number of single-member districts that allow Latino voters to elect a candidate of choice would create a strong presumption of a section 2 violation and, absent unique circumstances (such as I will detail below), would end up being a section 2 violation.[51]

Importantly, here is what rescuing retrogression helps preserve that the existing section 2 framework might very well not. In the hypothetical, it is not at all clear that even if the *Gingles* preconditions existed and plaintiffs presented evidence of some—or even most—of the Senate factors, that a section 2 results violation would be found. A court might easily say that one out of five districts in the context of a 33% Latino citizen voting age population provides sufficient representation for Latino voters and, therefore, does not amount to a section 2 violation.[52] Indeed, perhaps the greatest problem with applying section 2 in the vote dilution context comes in this

50. The details of what constitutes "newly adopted" could be worked out on a case-by-case basis. The paradigm is a situation where, say, a redistricting plan or new voter identification requirement is adopted by a state or local government and then challenged by minority plaintiffs relatively soon after adoption. I would not allow section 2 plaintiffs to sit on their rights for, say, a decade and then challenge a law as retrogressive.

51. One thing that should be considered is what the remedy for such a violation would be. In many instances, reinstatement of the prior existing law would likely be the appropriate remedy. For example, if a city attempts to switch from single-member districts to at-large elections and that switch is found to be retrogressive and violate section 2, then the remedy would be reinstatement of the single-member districting method of election. However, in the context of redistricting, often the prior redistricting plan will violate one person, one vote because of the publication of Census data demonstrating the existing districts are malapportioned. In such an instance, the remedy might be a court order to draw a new, non-retrogressive redistricting plan.

52. *See, e.g.*, Gonzalez v. City of Aurora, 535 F.3d 594 (7th Cir. 2008) (refusing to draw a second district (out of ten total districts) controlled by Latino voters when the Latino CVAP was 16.3%).

type of hypothetical where a single-member districting plan provides some representation but somewhat less representation than could be provided.[53]

While the reduction in the number of districts that allow Latino voters to elect a preferred candidate of choice would raise a presumption of retrogression, that presumption could be overcome by the city. For instance, the city might be able to show that demographic trends make it impossible to draw a second district for Latino voters while still complying with the constitutional mandate of one person, one vote.[54] Or, the city might be able to demonstrate that legally significant racially polarized voting does not permeate city elections. In short, retrogression would not be an automatic violation.[55]

Let's take another hypothetical example of how the presumption would operate, this time from the context of vote denial. Assume a county has a particular precinct that has a roughly even mix of African-American and white population. In the precinct, residential segregation exists such that the African-American population is almost exclusively on the south side of the precinct and the white population is almost exclusively on the north side. The precinct's polling place is a public building located on the south side of the precinct, but the county decides to move the polling place to a private building on the north side of the precinct, and there is evidence that such a move will lead to a lower turnout among African-American voters at upcoming elections. In such an instance, the retrogression of African-American voting strength would create a strong presumption of a section 2 violation.

Again, though, the presumption of a violation could be overcome. For instance, no violation would be found if the existing polling place

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53. As previously intimated, I think this constitutes an important additional "gap"—particularly at the local level—between section 2 and section 5 that was not sufficiently emphasized by Professor Stephanopoulos. *See supra* note 41 and accompanying text.

54. Reynolds v. Sims, 377 U.S. 533, 558 (1964) (articulating one person, one vote standard).

55. The idea that retrogression did not automatically violate section 5 was recognized by the Department of Justice in its review of redistricting plans:

> There may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting (*e.g.*, residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable. In those circumstances, the submitting jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011).

had burned down in a fire and no other location was available in the African-American portion of the precinct. Or, perhaps, the polling place had to be moved to accommodate disabled voters, and no other location accessible to disabled voters existed in the African-American portion of the precinct. As with vote dilution, the presumption of a Section 2 violation could be overcome by the defendant in the vote denial context as well.

To sum up, my proposal would be to have two "tracks" to proving a violation of the section 2 results standard.[56] The first track would be the traditional analysis that has been performed for vote dilution (i.e., proof of the *Gingles* preconditions and then an analysis of the totality of the circumstances) and vote denial cases for some time. The second track—what might be called the "retrogression track"—would be proof of retrogression that creates a strong, though rebuttable, presumption of a section 2 violation. In this way, the section 5 retrogression standard could be rescued.

B. Why Rescue Retrogression?

My proposal "rescues" retrogression, but why would we want to do that? The primary reason to rescue retrogression is to retain the gains made by minority voters that have occurred since initial passage of the Voting Rights Act of 1965. Moreover, my proposal to rescue retrogression is doctrinally workable and relatively realistic. That said, rescuing retrogression inevitably involves trade-offs and potential downsides, which will also be explored.

The primary reason for rescuing retrogression is that the gains made by the Voting Rights Act since its adoption in 1965 must be preserved. In 2008, I wrote an article in the *Alabama Law Review* positing that the Voting Rights Act had entered an "Era of Maintenance" and that the primary goal of the Voting Rights Act going forward should be to maintain the gains made by minority voters.[57]

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56. It should be noted that Professor Stephanopoulos has advocated for changes to the substantive side of section 2 in the vote dilution context that would apply section 2 coverage to "districts that are strangely shaped or whose minority populations are heterogeneous or below 50 percent in size." Stephanopoulos, *supra* note 10, at 61. In the vote denial context, he proposed to "make disparate impact alone the standard for Section 2 liability." *Id.* He avers that this would generally create "Section 2 liability . . . in the exact circumstances in which there is retrogression under Section 5." *Id.* at 123. However, because Professor Stephanopoulos's focus was on identifying the gap between section 2 and section 5, both theoretically and empirically, he did not elaborate very much on these proposals. Indeed, he spent much more time discussing other ideas, such as a revised coverage formula or enhanced section 3 coverage, to fix the gap between section 2 and section 5. *Id.* at 119-22. Thus, while it might seem that Professor Stephanopoulos would agree that the retrogression test should be rescued—particularly in the context of vote dilution—it's not clear that he would create the same system that I would.

57. *See generally* Pitts, *Maintenance*, *supra* note 7, at 906.

As I wrote:

> Maintenance . . . may well represent the proper approach because it serves to best balance the competing realities and theories of the democratic process. No one theory can explain or set the entire agenda for American democracy . . . maintenance, with its allowance for traditional vote dilution litigation, recognizes the need to break up entrenched political interests that completely (or nearly completely) stifle political accountability to minority voters . . . [and] maintenance recognizes that the ability to compete in the legislature for preferred policy preferences . . . requires that the "toe-hold" that minority groups have in terms of descriptive representation be retained.[58]

Without question, minority voters are a lot better off in 2015 than they were in 1965. The ability of minority voters to participate—to register and cast a countable ballot—has drastically improved.[59] Moreover, many more minority candidates are elected to federal, state, and local offices in 2015 than were elected in 1965.[60]

Despite these substantial gains, one would not say that we've arrived at perfect equality. In terms of participation, Latino and Asian-American registration and turnout rates are significantly lower than those of whites and African Americans.[61] When considering descriptive representation, it is certainly true that the number of minority officials has increased substantially. However, minority groups remain "underrepresented at almost every level of government."[62] Indeed, the underrepresentation of minority groups remains most pronounced at the state and local level of government—the place where section 5 may have had its greatest impact.[63] At the state

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58. *Id.* at 908.

59. KHALILAH BROWN-DEAN ET AL., JOINT CENTER FOR POLITICAL & ECON. STUDIES, 50 YEARS OF THE VOTING RIGHTS ACT 8 (2015), http://jointcenter.org/sites/default/files/VRA%20report%2C%203.5.15%20%281130%20am%29%28updated%29.pdf ("[S]ince the Voting Rights Act's 1965 passage, African Americans residing in former Confederate states have gone from near total disenfranchisement to registration and turnout rates that equal or surpass those of whites in the same states, at least in presidential general election contests.").

60. Juliet Eilperin, *What's Changed for African Americans Since 1963, by the Numbers*, WASH. POST (Aug. 22, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/22/whats-changed-for-african-americans-since-1963-by-the-numbers/ ("The number of African-American elected officials has also risen dramatically since researchers started tracking it in 1970. Forty-three years ago there were 1,469 black elected officials nationwide . . . in 2011 there were roughly 10,500 such officials."); BROWN-DEAN, *supra* note 59, at 24-29 ("Since 1965, African Americans went from holding fewer than 1,000 elected offices to over 10,000, Latinos from a small number to over 6,000, and Asian Americans from under a hundred to almost a thousand.").

61. BROWN-DEAN, *supra* note 59, at 8 ("Latino and Asian American registration and turnout rates, however, continue to trail [whites and African Americans] significantly.").

62. *Id.* at 29.

63. *See supra* notes 25-26 and accompanying text.

level, whites account for 85% of all the seats even though whites are only 75% of all voters and 62% of the total population.[64] At the local level, "whites still hold well over 90% of all local offices."[65]

Because some minority groups do not yet participate to the same extent as whites and because all minority groups have substantially less than proportional representation, *it is enormously important that we maintain the gains that have been made thus far.* I do not think the *Shelby County* decision means we are inevitably headed toward another era of massive, blatant disfranchisement and voting-related discrimination, such as occurred during the late 1800s.[66] Yet it is important to remember the disfranchisement of the late 1800s did not happen overnight—it happened gradually over a period of about a quarter century.[67] In light of that history, and current facts, preventing retrogression of minority voting strength should be at the forefront of Voting Rights Act enforcement, and rescuing retrogression helps quite a bit to achieve that end.[68]

Rescuing retrogression also makes sense from a doctrinal perspective. I take, as a given, that UC-Davis's Chris Elmendorf is correct when he notes that section 2 essentially amounts to "a delegation of authority [by Congress] to the courts to develop a common law of racially fair elections."[69] And that "Section 2 precedents should not enjoy the super-strong stare decisis typical of statutory precedents, but rather the weak stare decisis of precedents under the Sherman Act, the paradigmatic common law statute."[70] Because of these insights, flexibility exists to employ the common law of section 2 as a "vehicle for innovation and change."[71]

The "famously elliptical"[72] language of section 2 provides a hook in the statutory text for rescuing retrogression through common law interpretation. Section 2's plain language interprets "results" as a "totality of the circumstances" standard.[73] The above language also interprets results in the opaque language of "less opportunity . . . to

64. BROWN-DEAN, *supra* note 59, at 32.

65. *Id.* at 33.

66. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 1, 121-22 (2004).

67. *Id.*

68. Because maintenance of existing minority voting strength is the primary goal, I would not allow minority heterogeneity of a district to serve as a justification for retrogression. *See* Stephanopoulos, *supra* note 10, at 78-80 (discussing minority heterogeneity).

69. Elmendorf, *supra* note 47, at 404.

70. *Id.* at 384.

71. Max Huffman & Mark Anderson, Devils, Scripture, and Antitrust 6 (Mar. 2015) (unpublished manuscript) (on file with author).

72. Gonzalez v. City of Aurora, 535 F.3d 594, 597 (7th Cir. 2008).

73. 52 U.S.C. § 10301(a) (Supp. II 2014).

participate in the political process and to elect representatives of their choice."[74] Section 2's language also allows the "extent to which members of [a minority group] have been elected to office" as a factor to be considered in the totality of circumstances analysis.[75] Finally, section 2 does not create a "right" to proportional representation.[76]

A full excursus into a statutory analysis of section 2 lies beyond the scope of this modest Article. But, at first blush, a totality of the circumstances analysis creates room for retrogression to serve as a presumption of a section 2 violation.[77] Indeed, the Supreme Court, in the early 1990s, added a new factor to the section 2 totality of the circumstances analysis, so precedent exists to support modifying the analysis.[78] Moreover, retrogression of minority voting strength would also seem to create, absent other compelling factors, "*less* opportunity" for minority group members "to participate in the political process and to elect representatives of their choice."[79] Finally, to the extent

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74. *Id.* § 10301(b).

75. *Id.*

76. The full text of section 2 reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. § 10301.

77. *Cf.* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 241 (4th Cir. 2014) ("First, the district court bluntly held that 'Section 2 does not incorporate a "retrogression" standard' . . . . Contrary to the district court's statements, Section 2, on its face, requires a broad 'totality of the circumstances review.' Clearly, an eye toward past practices is part and parcel of the totality of the circumstances." (first quoting N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 351 (2014); then quoting 52 U.S.C. § 10301(b))).

78. *See generally* Johnson v. De Grandy, 512 U.S. 997 (1994) (adding proportionality as a consideration in the section 2 analysis).

79. 52 U.S.C. § 10301(b) (emphasis added); *cf.* Ohio State Conference of the N.A.A.C.P. v. Husted, 768 F.3d 524, 558 (6th Cir. 2014) ("[U]nder the Section 2 analysis, the focus is whether minorities enjoy less opportunity to vote *as compared to other voters.* The fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is therefore relevant to an

the retrogression presumption applies to vote dilution claims, it considers the extent to which minority group members achieve electoral success and does not create a right to proportional representation because all it does is preserve existing gains rather than compel additional efforts to achieve proportional representation.[80]

One could also find additional, though non-definitive, support for retrogression creating a presumption of a section 2 violation in one of the most recent Supreme Court decisions interpreting section 2. In *League of United Latin American Citizens v. Perry* (*LULAC*), a key to the Court's holding that Texas' congressional redistricting plan violated section 2 was the fact that the State "took away the Latinos' [ability to elect a candidate of choice] because Latinos were about to exercise it."[81] Indeed, the Court mentioned that this change "undermined the progress of a racial group that has been subject to significant voting-related discrimination."[82] In essence, one might easily recast the *LULAC* decision as one that fits with the general proposition that the section 2 results standard should generally prohibit the adoption of retrogressive voting laws.

In addition to theoretical and doctrinal reasons for rescuing retrogression, a practical reason also exists. Using retrogression as a presumption for a violation of the results test provides a relatively administrable standard. The retrogression test was implemented for several decades, and little evidence demonstrates that the test was difficult to administer. The Court, in the arena of election law, tends to prefer relatively simple tests to more complex inquiries with perhaps the paradigm of doctrinal administrability being the "sixth-grade arithmetic" of one person, one vote.[83] In essence, retrogression as a presumption of a section 2 violation amounts to a judicially manageable standard.

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assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters."), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

80. Perhaps the biggest doctrinal road-block to my proposal is a single sentence from a footnote in the Senate Report that accompanied the 1982 Amendment to section 2: "Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group." S. Rep. No. 97-417, at 68 n.224 (1982). Of course, legislative history can easily be pushed to the side by using a plain-language interpretation. But, beyond that, because my proposal only involves retrogression creating a strong presumption of a section 2 violation, it is possible to argue that such a claim involves more than just demonstrating retrogression—it involves demonstrating that the retrogression has not been justified by the defendant.

81. 548 U.S. 399, 440 (2006).

82. *Id.* at 439.

83. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting); *see also* Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1099-1103 (2010) (discussing "manageability" as a theme of Voting Rights Act doctrine).

At the end of the day, the main reason to adopt my proposal—the need to maintain the gains made by minority voters since passage of the Voting Rights Act in the covered jurisdictions where many minority citizens reside—is both practical and theoretical. The doctrinal justifications merely show my proposal to be a plausible interpretation of section 2.[84] Moreover, I think this proposal has more potential to be adopted because all it would take to be implemented is a change of one member of the Supreme Court rather than congressional action.[85]

C. *Concerns About Rescuing Retrogression*

Of course, any doctrinal test inevitably involves trade-offs. There are potential downsides to importing the section 5 retrogression test into the section 2 results standard. The primary downside on the vote dilution front would seem to be that section 5's retrogression standard emphasizes descriptive over substantive representation and may not do much to move toward a day when the Voting Rights Act becomes unnecessary. The primary downside on the vote denial front would seem to be that the retrogression test might inhibit experimentation by state and local governments because they would be concerned about getting "stuck" with progressive changes. In addition, a few other less pressing problems merit discussion.

When it comes to vote dilution, rescuing retrogression will mean that, absent special circumstances, state and local governments will need to preserve districts that allow minority voters to elect their preferred candidates of choice. These types of districts almost invariably lead to minority voters achieving "descriptive representation"—the ability to elect candidates of the same minority group as the minority voters who control outcomes in the single-member district.[86] The elevation of descriptive representation to such an inviolate level could lead to a reduction in substantive representation—the ability of minority voters to get their preferred policies implemented by legislative bodies.[87]

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84. I leave to one side issues as to whether importing retrogression into section 2 would violate the United States Constitution. Presumably, a Supreme Court willing to rescue retrogression will find a way to avoid holding that such an approach violates the Constitution. Regardless, there is recent evidence that civil rights remedies heavily reliant on disparate impact analysis will pass constitutional muster. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (upholding use of disparate impact standard in the Fair Housing Act).

85. I'm far less certain a change in membership of the Supreme Court would result in the overruling of *Shelby County*. It's quite possible that ship has sailed.

86. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1569 (2002) (discussing descriptive representation).

87. Georgia v. Ashcroft, 539 U.S. 461, 481 (2003) (defining substantive representation).

But there may be reasons to prefer descriptive representation over substantive representation. First, descriptive representation is something courts can workably define, whereas other measures of political power seem harder to pin down.[88] Second, descriptive representation sends an important symbolic message that may lead to greater participation.[89] Third, descriptive representation, while not perfect, may well lead to substantive representation, particularly at the local level.[90] Fourth, it's not obvious to me that a clear path exists to achieve substantive representation. Put differently, even if substantive representation is the goal, will lessening the amount of descriptive representation actually cause better political outcomes for minority voters?[91] Finally, rescuing retrogression would help preserve one type of district that seems more favorable to substantive representation—the "crossover" district.[92]

Another problem with rescuing retrogression is that it may create outcomes that seem unfair when comparing the electoral practices of different jurisdictions, particularly in the vote denial context. For instance, one state may have same-day voter registration and another state may have a thirty-day advance registration requirement. Perhaps the state with same-day voter registration would like to implement a ten-day advance voter registration requirement, but doing so would retrogress minority voting strength. In this situation, rescuing retrogression would lead to one state not being able to make a change that might still be more liberal than another state, leading to what some might view as unfair treatment.

But section 2 and, indeed, election law itself has never been interpreted to require the exact same outcomes for different jurisdictions. For instance, in some places at-large elections violate section 2, but

88. *Cf.* Nicholas Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. Rev. 1527, 1540 (2015) (noting that judges could have difficulty assessing group political influence).

89. Jennifer L. Merolla et al., *Descriptive Representation, Political Efficacy, and African Americans in the 2008 Presidential Election*, 34 POL. PSYCHOL. 863, 873 (2013) ("The evidence is fairly strong that having descriptive representat[ion] increases political participation.").

90. Kenneth J. Meier et al., *Structural Choices and Representational Biases: The Post-Election Color of Representation*, 49 AM. J. POL. SCI. 758, 759 (2005) ("[S]tudies at the local level present evidence that descriptive representation is indeed associated with substantive policy representation."); Robert R. Preuhs, *The Conditional Effects of Minority Descriptive Representation: Black Legislators and Policy Influence in the American States*, 68 J. POL. 585, 597-98 (2006) (concluding that in state legislatures "descriptive representation has real implications for substantive representation and policy influence").

91. *Cf.* Pitts, *Maintenance*, *supra* note 7, at 979 (questioning whether it is practical to trade off descriptive representation for substantive representation in most redistricting contexts, most notably at the local level).

92. *See supra* text accompanying note 41 (noting that "crossover" districts are part of the "gap" between section 2 and section 5).

in other places, at-large elections do not.[93] As one court recently noted: "The focus [of Section 2] is on the internal processes of a single State or political subdivision and the opportunities enjoyed by that particular electorate. The text of section 2 does not direct courts to compare opportunities across States."[94] Indeed, other areas of election law work the same. In some instances, drawing a district allowing minority voters to elect a preferred candidate of choice will constitute racial gerrymandering; in other instances it will not.[95] In some instances, an overall range of relative deviation of 0.6984 violates one person, one vote doctrine, in other instances, a higher overall range of relative deviation of 0.79 does not.[96] A section 2 violation is always contingent upon particular facts and circumstances and has never mandated a "one-size fits all" approach—section 2 demands an "intensely local appraisal."[97]

The real problem when it comes to different treatment among the states is that rescuing retrogression might provide a disincentive to the adoption of electoral changes favorable to minority voters. For instance, a state might consider adopting, say, same-day voter registration but decide not to do so because this will create a new baseline for minority participation that the state will be stuck with forever. In this way, a section 2 that rescues retrogression might stifle electoral innovation.

Admittedly, this is a possibility, but probably not a large problem. It seems to me that the barrier to the adoption of changes that would be disproportionately positive for minority voters is not fear of being stuck with the change in perpetuity but not wanting minority voters to cast more ballots in large part because of their political leanings toward the Democratic Party.[98] Put differently, if a jurisdiction wants to adopt a change favorable to minority voters, I do not think the new, more favorable voting rights baseline it creates is likely to be a

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93. Gerald Benjamin, *At-Large Elections in N.Y.S. Cities, Towns, Villages, and School Districts and the Challenge of Growing Population Diversity*, 5 ALB. GOV'T L. REV. 733, 747-48 (2012) (describing successful and unsuccessful section 2 challenges to the use of at-large elections in New York counties). The same point goes for vote dilution litigation under the Constitution. *Compare* Whitcomb v. Chavis, 403 U.S. 124 (1971) (declining to invalidate multi-member districts in Indiana), *with* White v. Regester, 412 U.S. 755 (1973) (declaring invalid multi-member districts in Texas).

94. Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 559 (6th Cir. 2014).

95. *Compare* Miller v. Johnson, 515 U.S. 900 (1995) (finding that racial gerrymandering occurred in Georgia), *with* Easley v. Cromartie, 532 U.S. 234 (2001) (finding that no racial gerrymandering occurred in North Carolina).

96. *Compare* Karcher v. Daggett, 462 U.S. 725, 727 (1983) (rejecting New Jersey's congressional districting plan), *with* Tennant v. Jefferson Cty. Comm'n., 133 S. Ct. 3, 6 (2012) (upholding West Virginia's congressional districting plan).

97. Thornburg v. Gingles, 478 U.S. 30, 79 (1986).

98. I leave aside the incredibly thorny question of whether race or politics is the primary motivation in such an instance.

major barrier.[99] Moreover, jurisdictions could avoid being stuck with changes in perpetuity by either adopting changes as short-term pilot programs or with sunset provisions that would not create a new benchmark for minority voting strength forever. Indeed, it is quite possible that the only "innovation" that will be stifled is the type of innovation adopted by North Carolina after the *Shelby County* decision.[100]

There are also scenarios that would seem to be outliers that might pose thorny problems. For instance, it is possible a voting change would be beneficial to Latino voters at the expense of African-American voters. In such an instance, the presumption of a violation might be overcome by the jurisdiction if there is a demonstrated benefit to another minority group. Another likely outlier situation would be where a change is retrogressive for minority voters but would lead to greater participation by the electorate as a whole. Again, though, in this instance, a jurisdiction might be able to overcome the presumption of a violation through such a showing. And another outlier situation might occur when a minority group has much greater than proportional representation. But, again, a jurisdiction might be able to overcome the presumption of a violation.

Tough and unique cases may present themselves, but my overall point is that in the run of situations, it would be better to rescue retrogression and to worry less about unique circumstances. We should do what we can to preserve the significant gains made by minority voters since 1965, and the potential downsides of rescuing retrogression do not outweigh the need to maintain these gains.

IV. CONCLUSION

The section 5 process seems unlikely to re-emerge on the voting rights landscape. However, section 5's substantive retrogression test should be rescued and imported into the section 2 results standard. This should occur because an overarching goal of the Voting Rights Act should be to maintain the gains fostered by the Act since 1965.

Admittedly, the proposal included in this Article is a modest one, and one that will not cure all that ails American democracy from the standpoint of minority voting rights. And even such a modest proposal seems unlikely, absent a change in membership of the Supreme Court, to be adopted. But in picking up the pieces of *Shelby County*, one has to start somewhere—and that start should be rescuing retrogression.

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99. Of course, I admit on the margins this could make a difference. For instance, if passage of a new election law by the legislature is a close call, it is possible a key vote could be lost for this reason.

100. *See supra* notes 19-23.